



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

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Joint Application of

**TACA INTERNATIONAL AIRLINES, S.A.
LINEAS AEREAS COSTARRICENSES S.A.
AVIATECA S.A.
NICARAGUENSE DE AVIACION, S.A.
TACA DE HONDURAS S.A. DE C.V.
TRANS AMERICAN AIRLINES, S.A.**

Docket OST-2004-17355

for registration of trade name under 14 C.F.R. 215

ORDER TO SHOW CAUSE

Summary

On March 17, 2004, the six Central American carriers captioned above (hereafter collectively referred to as the "TACA Group"), filed a joint application in this Docket asking approval to register for their collective use the trade name "TACA" and use the designator code "TA" for all of their services to/from the United States. By this order, we have tentatively decided to grant the TACA Group an exemption, to the extent necessary and subject to conditions, for them to proceed as proposed, for a period of one year.

TACA Group Application

On March 17, 2004, the TACA Group jointly filed the above-captioned request, stating that they propose to use the name "TACA" and the designator code "TA" in the marketing and selling of all their U.S. services. The TACA Group asserts that their use of the common name/code will

help them market and sell their services more effectively and build consumer awareness of their operations.¹ The joint applicants claim that use of the common name/code will permit them to compete more effectively with larger carriers and airline alliances, and to save money on marketing. Further, the TACA Group asserts that what they are asking is fully consistent with the open-skies agreements that their homelands have entered into with the United States and the benefits they would gain from favorable Department action on their request would enable the carrier group to participate more fully in the open-skies opportunities.

The TACA Group states that under its proposal:

- 1) All TACA Group carriers will identify their flights to and from the United States under the common “TA” designator code and will stop using other two-letter designator codes. In addition to use of the “TA” code, each TACA Group carrier will identify its U.S. flights by using dedicated flight numbers. Each TACA carrier will be assigned a series of dedicated flight numbers and will identify its flights with the “TA” code and its own flight numbers;
- 2) The TACA carriers will disclose fully their use of the common code. In this connection, advertisements will include notification to consumers that flights are operated by a TACA carrier affiliate, and will identify each TACA carrier’s full legal name as well as its common name in cases where the common name may not be apparent;
- 3) TACA carrier flights held out in the Official Airline Guide, all editions, will be shown with the “TA” designator code and a flight number from each TACA carrier’s dedicated series of flight numbers. Listed adjacent to the flight number will be an easily identifiable mark, such as an asterisk, diamond, arrow or plus sign, notifying consumers that they should consult the OAG further for the identity of the operating carrier. Disclosure of the operating carrier’s identity will be made in the back of the OAG in the section devoted to disclosure of code-share services, and will be presented in a manner that is consistent with code-share disclosures;
- 4) The TACA Group carrier will disclose the operating carrier’s identity in global distribution system (GDS) displays. In addition to the Group’s using the “TA” designator code coupled with a flight number from the dedicated series, appearing in the “segment sell” display immediately beneath each TACA carrier flight will be a statement identifying the operating carrier and the marketing carrier;
- 5) The TACA carriers will prominently disclose on each passenger’s itinerary, the operating carrier’s identity, and the itinerary will show the flight’s origin and destination cities, the times of departure and arrival, and the flight number. Immediately under this information, the itinerary

¹ The TACA Group carriers and their homelands are as follows: TACA International Airlines – El Salvador, Lineas Aereas Costarricenses (LACSA) – Costa Rica, AVIATECA – Guatemala, Nicaraguense de Aviacion – Nicaragua, TACA de Honduras – Honduras, and Trans American Airlines – Peru. The TACA Group carriers already hold statements of authorization (in Docket OST-2000-8342) permitting them jointly to operate code-share services. An affiliated carrier, TACA Ecuador, does not hold authority under Part 212 to code-share with the other TACA carriers and is not an applicant in this case.

clearly will identify the operating and marketing carrier. In the case of multiple segments or roundtrip itineraries, the TACA carriers clearly shall disclose the operating and marketing carrier for each flight segment;

6) Each TACA carrier, on each passenger's ticket, will disclose the operating carrier. Each ticket will show each flight number, taken from the dedicated flight-number series, with the "TA" code. Further, the passenger ticket clearly will show the operating carrier's identity; and

7) The TACA Group will provide its reservation and customer services offices with disclosure notices that will be read to consumers before making reservations. This disclosure will notify each consumer of the identities of the operating and marketing carriers for the "TA" coded flight.

The TACA Group asserts that, under its disclosure proposal, the traveling and shipping public, travel agents, and government regulatory authorities will be able to identify which TACA carrier is operating each flight. Moreover, the joint applicants assert that they will comply with the consumer-disclosure provisions of the Department's regulations under 14 CFR Part 257.

The TACA Group states that it would not view favorable action on the subject name/code request as allowing its member carriers to conduct any seventh freedom services for which they do not hold Department authority. The joint applicants state that at no time will one TACA carrier operate or sell seats or cargo space on a flight operating solely between the United States and the homeland of another TACA carrier, unless such service expressly has been approved by the Department.

The TACA carriers note that they will observe all existing operating restrictions imposed by the FAA's International Aviation Safety Assessment (IASA) program, and that all TACA carrier flights will continue to be operated by individual carriers under the safety oversight of their respective homelands' regulators. Also, the joint applicants assert that each carrier will continue to perform services within the constraints of its own operating authority issued by the Department and FAA, to employ its own crews, and operate its own aircraft.

In addition, the joint applicants assert that they will observe the Department's policies and regulations requiring that the marketing carrier assumes responsibility to the passenger under the marketing carrier's contract of carriage. In this connection, the joint applicants say that, in the case of a ticket issued with the "TA" common code, the contract of carriage will be between the passenger and the TACA carrier whose dedicated flight number is paired with the "TA" code, which, in all cases, will be the marketing carrier.

Continental Airlines Answer

On March 23, 2004, Continental Airlines filed an answer in opposition to the joint application. Continental Airlines asserts that the request to use the common name and code is an attempt to evade code-sharing principles by jointly branding six different carriers of six different homelands with the code of what appears to be their controlling member: TACA of the homeland El Salvador.

Continental Airlines claims that Department approval of this request could have negative effects, particularly since comparable alliance branding would have to be permitted reciprocally for U.S. carriers serving Central America, such as Continental Airlines in partnership with COPA. Continental Airlines asserts that the TACA Group proposal raises serious issues, including consumer confusion, liability, competitive concerns about joint pricing and scheduling, ownership and control, the giving of expansive rights to multiple countries, possible seventh-freedom and cabotage carriage and safety concerns.

Continental describes the TACA Group proposal as being a “new type” of code sharing that goes beyond the Department’s current code-share policy without benefits to consumers. In this connection, Continental Airlines claims that the TACA carriers are really not seeking to create an alliance code, but actually attempting to use their primary carrier’s code (that is, TACA of El Salvador) for the services of the other five airlines, which exceeds what the Department would authorize under Part 212.

Moreover, Continental Airlines expresses its belief that the TACA Group’s claim that the common name/code would help them market and sell their services more efficiently is lessened by the fact that the TACA name and “TA” code already are well recognized. Continental Airlines further says that the joint applicants currently enjoy a strong presence in the U.S.-Central America market and do not have antitrust immunity from the Department to use a common name and code, nor to reach agreements on pricing, routes, schedules or capacity.

In addition, Continental Airlines asserts that, if the Department were to act favorably on the TACA Group’s request, the TACA consortium of carriers would become even stronger, especially in light of the TACA Group’s code-share relationship with American Airlines. The carrier adds that, although the applicable bilateral open-skies agreements do permit carriers to enter into cooperative marketing arrangements such as code shares, they do not provide for the common branding sought here.

Delta Air Lines Answer

On April 1, 2004, Delta Air Lines filed an answer. Delta asserts that if the Department acts favorably on the TACA Group request to use a common name and code, it must then be prepared to approve similar single-brand requests by other airline alliances, such as SkyTeam (Delta’s alliance).

Delta further asserts that, since the applicable bilateral agreements in this case do not clearly provide for the type of single branding that the TACA Group requests, that there is an issue of whether the application is supported by adequate reciprocity with the six homelands. Delta claims that before the Department could act favorably in this case, it needs governmental assurances (and imposition of conditions) to ensure that single-brand U.S. carrier alliances will be able to secure approval to hold out their services in the TACA Group homelands.

Moreover, Delta notes that the Department does not allow a U.S. carrier to place its code on an IASA Category 2 carrier under a code-share arrangement, even with disclosure of the operating carrier. Delta concludes that, in the circumstances of this case, the Department carefully should consider whether approval of code shares between these Category 1 and 2 carriers is warranted.²

TACA Group Reply

On April 16, 2004, the TACA Group filed an additional pleading.³ In its pleading the TACA Group asserts that Continental Airlines' answer does not warrant denial of its application and reiterated its position that its proposal for use of a common name/code will provide public benefits and raises no significant safety, antitrust or other major concern. The joint applicants claim that their proposal meets or exceeds every regulatory requirement of the Department and the FAA.

In addition, the TACA Group emphasizes its belief that Department approval is warranted, so that they will be able to compete more effectively with worldwide alliances and large individual carriers, such as Continental, and to reap the economic benefits of the open-skies bilateral agreements that all of their homelands have signed with the United States.

Continental Airlines Additional Pleading

On April 23, 2004, Continental Airlines filed an additional pleading. It claims that if, as the joint applicant's assert, common branding really reduces costs, increases consumer recognition, and leads to more effective competition, then the Department must be prepared to permit common branding by all airline alliances. Also, Continental Airlines asserts that in this case it and Delta have raised significant reciprocity, competition, safety, consumer and seventh freedom issues that the joint applicants have not adequately addressed.

TACA Group Additional Pleading

On April 23, 2004, the TACA Group filed an additional pleading in this matter, claiming that the additional pleading filed by Continental Airlines on April 23 contains no new facts, arguments or reasons why its application should not be approved.

² Under the FAA's IASA program, a foreign carrier from a Category 2 country may not expand its U.S. services above what it was conducting at the time that its homeland was placed in Category 2.

³ Together with its pleading, the TACA Group filed a motion for leave to file it. We grant the motion and also accept the subsequent two additional pleadings that were filed in this case.

Tentative Decision

We tentatively have decided to grant the TACA Group an exemption under 49 U.S.C. section 40109, to the extent necessary to permit the TACA carriers to register under 14 C.F.R. Part 215 for their collective use the trade name “TACA” and use the designator code “TA” for all of their services to/from the United States, for a period of one year and subject to consumer-related disclosure conditions, as explained below, and other standard conditions. In taking our action, we tentatively find that grant of this authority, as conditioned, would be in the public interest.

While the TACA Group request may appear to be one of first impression, the issue of common branding is something that we have long recognized might be of interest to certain associated carriers. Indeed, we have expressly referred to the common branding possibility in a number of our orders, specifically signaling carriers wishing to take advantage of this approach that they would need to seek our authority to do so.⁴ This is in fact what the TACA Group has done.

We have now carefully examined its proposal and the comments filed in response, and we have tentatively found in favor of approval, subject to conditions. We tentatively find that there are public benefits that can be realized from implementation of the proposed common name and code. First, the TACA Group’s plan will increase consumer awareness of their services, which can benefit the traveling public by promoting competition in the affected markets. Also, approval could serve to promote and further the already healthy liberal aviation relationships we have established with the TACA Group’s homeland governments, by allowing the carriers to make better use of the rights provided by the open-skies agreements which these governments have concluded with the United States. We have reviewed the objections to the request and have tentatively concluded that to the extent they raise concerns that would be germane to our public interest analysis, the conditions we would attach would preserve the basis for our favorable public interest finding.

We note that the TACA Group states its intention to comply with the consumer-disclosure provisions of Part 257. We tentatively find, however, that the nature of the TACA Group proposal requires a still higher degree of consumer notice and protection. In that connection, we tentatively have decided to condition the authority with the notice and disclosure provisions that the Group delineated in its application (and which are noted on pages 2-3 of this order).

With regard to the concerns expressed on the record about matters relating to safety, and specifically to issues involving operations by foreign carriers from countries that the FAA has placed in IASA Category 2, we note that the TACA carriers which already hold authority to code-share with one another (see Department Action, taken December 1, 2000, in Docket OST-2000-8342) here assert that they will observe all existing operating restrictions imposed by the FAA’s IASA program. They further assert that all of their flights will continue to be operated by the individual carriers under the safety oversight of their respective homelands’ regulators.

⁴ See, for example, Order 2002-1-6 at page 7.

Finally, they will continue to perform services within the constraints of their own operating authority issued by the FAA. Against this background, we tentatively conclude that the proposed arrangement as conditioned does not undermine the public interest on the basis of safety.

In addition, we tentatively are not concerned that favorable action on the TACA Group's request would entice any of those carriers to initiate scheduled seventh freedom operations, for which they lack authority. The joint applicants indicate that they would not interpret approval of their plan as allowing them to expand their U.S. route authority to initiate unauthorized seventh freedom flights. We have ample means to address any abuses in this area, as warranted.

Further, we tentatively are not persuaded that there is a potential for anti-competitive behavior to arise from favorable action on this application. The TACA Group has not asked for anti-trust immunity in this case, and does not hold immunity for its currently authorized code-share operations. With respect to the competition concerns raised by Continental Airlines, we recognize it is normal that the TACA Group would anticipate gaining some commercial benefit under its proposed arrangement, but we see those benefits as serving to enhance competition rather than diminish it. Accordingly, we see potential advantages to the public, and to our overall aviation relationships with the foreign governments involved. In these circumstances, it is our tentative view that the benefits that may accrue to the TACA Group would not form a basis to reject its application on competitive grounds.

The TACA Group's request in its application is extra-bilateral. The United States, however, enjoys good aviation relations with the subject homelands and there is no evidence on the record of this case that any of the TACA carrier homeland authorities would not act favorably on analogous requests by U.S. carriers. We have open-skies agreements with all of the TACA Group homeland countries, and we fully expect that the applicants' homelands will accord reciprocal benefits to carriers of the United States. Saying that, however, we recognize the need to allow for the possibility that developments might prove otherwise. Consequently, we would intend, should we finalize our tentative action here, expressly to reserve the right to amend, modify, or withdraw the subject authority, as warranted, thereby providing a mechanism for addressing any problems that might arise in the area of reciprocity.

Finally, nothing we are proposing to do here should be seen as either assuring or precluding approval of requests from other carrier groupings or alliances. As we have done here, we will consider any additional requests of this type on a case-by-case basis, based on the particular record and circumstances presented.

ACCORDINGLY:

1. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions, granting the TACA Group an exemption under 49 U.S.C. section 40109, to the extent necessary to permit the TACA carriers to register under 14 C.F.R. Part 215 for their collective use the trade name "TACA" and use the designator code "TA" for

all of their services to/from the United States, subject to the proposed limits and conditions as set forth in the body of this order;

2. We direct all interested persons to file in this Docket (original and five copies) their objections to our tentative findings and conclusions, within seven calendar days from the date of service of this order, and to serve their pleadings on all parties to this case;
3. Interested persons must file their answers in this Docket (original and five copies) to any objections within five calendar days from the date that answers are due, and serve their answers on all parties to this case;
4. The authority tentatively granted in ordering paragraph 1 shall, if finalized, be effective immediately and remain in effect for a period of one year from the date of service of a final order in this case;
5. We may amend, modify or revoke this authority at any time and without hearing;
6. If timely and properly supported objections are filed, we will afford full consideration to the matters or issues raised by the objections before we take further action. If no objections are filed, we will deem all further procedural steps to have been waived; and
7. We shall serve this order on the TACA Group, Continental Airlines, Delta Air Lines, the Federal Aviation Administration (AFS-50), and the Department of State.

By:

KARAN K. BHATIA
Assistant Secretary
for Aviation and International Affairs

(SEAL)

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